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No. 87-560

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

FMC WYOMING CORPORATION,
Petitioner,
v.
DONALD P. HODEL, Secretary of Interior, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER FMC WYOMING CORPORATION

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ARGUMENT

I. Respondents' Arguments Fail to Address the Central Issue Raised by FMC's Petition: Section 6 Does Not Apply to Pre-FCLAA Leases.

Because section 6 of the Federal Coal Leasing Amendments Act of 1975 ("FCLAA"), 30 U.S.C. § 207 (1982) describes a completely different kind of coal lease and

does not even mention existing coal leases, FMC has consistently pointed out that it cannot apply to pre-FCLAA leases under all applicable principles of statutory construction. Congressional silence cannot transform FCLAA into a law that radically alters existing leases.

FMC's coal leases were issued under section 7 of the Mineral Lands Leasing Act of 1920, 30 U.S.C. § 207 (1970), which provided among other things that coal leases would be subject to readjustment every twenty years "unless otherwise provided by law at the time of the expiration of such periods." *Id.* Pointing to this language, Respondents argue that the Tenth Circuit's decision was correct because the readjustment was nothing more than application of the new law existing at the expiration of FMC's first twenty-year readjustment period.

This argument completely begs the question. The issue raised by FMC's Petition is whether or not section 6 of the FCLAA does, in fact, "otherwise provide" for pre-FCLAA leases. Stated differently, the question presented is whether or not section 6 of the FCLAA even applies to pre-FCLAA leases. If it does not, then the law does *not* "otherwise provide" and Interior's arbitrary readjustment was unlawful.

Respondents' Brief in Opposition is therefore based on the assumed truth of the very issue raised for consideration by FMC's Petition. The most important issue currently facing the entire western coal industry is whether or not, as a matter of statutory construction, section 6 o fthe FCLAA applies to pre-FCLAA leases as a matter of law. Interior simply assumes for purposes of its argument to this Court that it does. This is precisely the same logical error made by th eTenth Circuit, and the effect of this error is to destroy the vested rights of hundreds of mineral lessees.

II. The Taking Issues Raised By the Tenth Circuit's Decision are of First Impression and Cannot be Dismissed by Citation to Authority Not on Point.

Relying once again on the "unless otherwise provided by law" language of the Mineral Lands Leasing Act, Interior argues that Congress reserved the power to amend the provisions relating to coal leasing and therefore imposition of the FCLAA on to pre-FCLAA leases cannot constitute a taking under *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986). As FMC pointed out in its Petition, however, it is not at all clear that the "unless otherwise provided by law" language of the Mineral Lands Leasing Act constitutes a reservation of power. Unlike *Bowen*, where Congress reserved the right to repeal the statute altogether, the express congressional intent in passing the Mineral Lands Leasing Act was to provide coal operators with certainty and stable, long term development rights. Since Congress deliberately created property rights with the Mineral Lands Leasing Act, any constitutional limit to the reservation of power doctrine are implicated here.

Since the Tenth Circuit's decision will dramatically affect the basic property rights of over 400 federal coal leases covering over 12 billion tons of coal, the taking issue can not be dismissed by citation to a case involving social security contributions.

III. Interior Has Already Acknowledged that the Legislative History Provides Little Guidance on the Issues Raised by FMC's Petition.

Finally, Respondents argue that it is "clear" Congress intended section 6 of the FCLAA apply to pre-FCLAA leases at readjustment. This categorical assertion is contradicted by the government's earlier position. Interior's construction of the FCLAA was based initially on a Solicitor's Opinion published in 1981 in which the Solicitor's office concluded that the terms of section 6 of the FCLAA

must be applied as a matter of law to pre-FCLAA leases. *Whether Leases Issued Prior to Aug. 4, 1976, Subject to Readjustment After That Date Must Be Readjusted to Conform to the Federal Coal Leasing Amendments of 1976*, Opinion by the Office of Solicitor #M-36939, 88 Interior Dec. 1003 (September 17, 1981). In that Opinion, the Solicitor exhaustively analyzed the legislative history of the FCLAA and concluded that the history "shed little light" on whether or not Congress intended section 6 of the FCLAA to apply to pre-FCLAA leases. *Id.* at 1007. The Solicitor noted that there are a number of conflicting indications of intent in the record. One of the examples he cited specifically discussing the *ambiguity* of the legislative history was the same comment of Representative Mink now relied upon by Respondents in support of their new assertion that congressional intent is "clear" in the legislative history. *Id.* at 1007-1008.

The Solicitor observed that Representative Mink's statement that existing leases would only be affected by FCLAA "to the extent" its provisions were applied upon readjustment could be read to mean FCLAA did *not* apply unless Interior chose to impose FCLAA terms upon readjustment. FMC agrees. If Congress intended FCLAA to apply to existing leases it could have simply said so. It did not. In fact, in 1978 Congress considered an amendment which would have explicitly applied FCLAA to pre-FCLAA leases and it failed. 124 Cong. Rec. 30,372-73 (1978).

CONCLUSION

In response to the important issues raised by FMC's Petition and the Briefs of *amici*, Interior could do nothing but advance deceptively facile arguments which beg the question and which are contradicted by their own prior conclusions. FMC respectfully requests that the Petition for Certiorari be granted.

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